85-1901

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Supreme Court, U.S.
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In The

Supreme Court of the United States

1986 TERM

SAMUEL J. RUSSOTTI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER, SAMUEL J. RUSSOTTI

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(12793)

In argument number six (page 23 of Respondent's Brief in Opposition) the government addresses the petitioner Russotti's argument that Federal Rule 804 (b)(1) on its face, and as interpreted by the Court in this case, violated the petitioner's constitutional rights to compulsory process and due process of law where its application prevented the introduction of exculpatory prior sworn testimony of two key witnesses unavailable to the defense at the time of the trial.

The respondent states that the "proffered testimony was not critical to the defense." It *was* critical to the defense. The petitioner was not charged in the state court with the crime of murder. That had already occurred in a state court conviction, which had been procured through the perjured testimony of several police officers, was dismissed with prejudice on the motion of the Monroe County District Attorney's Office when the perjury was discovered.

This petitioner, rather, is charged under RICO with being part of an enterprise that engaged in criminal activities, one of which was the murder of Massaro. The theory was that the "bosses" ordered other people to do the killings. The testimony by one of the alleged "bosses", namely Piccarreto, that the meeting wherein the order was supposed to have been given did not occur, was critical to the defense and highly relevant to the jury. It directly contradicted the only witness who claimed that this meeting wherein orders were given ever occurred.

The respondent states that the proffered testimony "did not possess any of the assurances of reliability that characterized the evidence in Chambers". That is simply inaccurate. The proffered testimony of Piccarreto was given under oath before a jury of his peers in a courtroom wherein the state prosecutor engaged in extensive cross-examination. These assurances of reliability have

been recognized by our system for hundreds of years as being one of the most significant assurances or reliability.

The prosecution states the testimony of Columbo and Piccarreto was "little more than bare, self-serving denials of culpability". Any time a defendant takes the stand in his own behalf it is obviously "self-serving". The motivation of the witness to testify is precisely what a jury is present in the courtroom to evaluate. That is a jury issue, not a means by which a prosecutor can keep relevant testimony from a jury.

The respondent states that the defendant Columbo's sworn grand jury testimony before the Monroe County Grand Jury "did nothing to exculpate" anyone but himself. Once again the whole nature of the RICO statute is ignored. The petitioner and the other co-defendants were charged with either giving the orders of executing the orders issued by the organization which led to the alleged incident that Columbo denies ever occurred. If it exculpates Columbo, it exculpates all of the alleged members of the enterprise and it is for the jury to decide.

It should be noted that at trial the government's only argument against the admission of the testimony was that the "same party," namely the federal authorities, did not conduct the cross-examination of either Piccarreto or Columbo. Rule 804(b)(1) is unconstitutional in that it allows the government in the case to use prior testimony of a non-testifying co-defendant against another at trial if it helps their case. According to the Rule, a defendant can not use that same testimony if its helpful or exculpatory to him and the the co-defendant is still unavailable. The respondent's arguments all go to jury questions of credibility and not to admissibility. The evidence was crucial to the case, it was exculpatory to the offering defendants, it had substantial assurance of reliability, and its unavailability was created by the prosecution because of its decision to jointly indict ten people.

That portion of Rule 804 which prevents the introduction of such testimony is unconstitutional. This question should be reviewed by this Court because of the obvious import of the issue. The government relied on a high percentage of hearsay to prove its case against the petitioner. This testimony was so critical to the petitioner's defense and is therefore an appropriate case for this Court to consider, regarding the application of the statute.

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